

## DEFINING THE AMBIT OF THE FREE SPEECH PRIVILEGE IN NEW ZEALAND'S PARLIAMENT

The various immunities and powers falling under the broad rubric of “parliamentary privilege” perform an important function in New Zealand’s constitutional structure.<sup>1</sup>

The Clerk of the New Zealand House of Representatives recently summed up the role played by this area of law as follows:

Privilege is part of the way in which the separation of powers is delineated in our political system and is a principal means of effecting a *modus vivendi* between the legislature and the other two branches of government. ... Parliamentary privilege, so far as the legislature is concerned, helps to preserve Parliament’s freedom from outside control and to give it and its members the legal tools and confidence they will need to perform their constitutional functions.<sup>2</sup>

However, parliamentary privilege is not a self-defining concept. Someone has to decide whether or not a particular matter falls within the ambit of one of Parliament’s various privileges. In the recent case of *Jennings v Buchanan*,<sup>3</sup> the Privy Council reasserted the judiciary’s role in performing this task,<sup>4</sup> in keeping with its general systems-function as interpreter and declarer of the law. This case required judicial consideration of the extent of Parliament’s “free speech” privilege — the absolute privilege accorded to words spoken during proceedings in Parliament — in the

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<sup>1</sup> See generally Campbell E, *Parliamentary Privilege* (2003); Joseph P, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) at 386-440; McGee D, *Parliamentary Practice in New Zealand* (2nd ed, 1994).

<sup>2</sup> McGee D, “The scope of parliamentary privilege” [2004] *New Zealand Law Journal* 84 at 84.

<sup>3</sup> [2004] UKPC 36.

<sup>4</sup> See *Stockdale v Hansard* (1830) 112 ER 1112 at 1154 (per Lord Denman); 1173-74 (per Littledale J). See also *Awatere Huata v Prebble* [2004] 3 NZLR 359 at para 59 (CA) (per McGrath J).

context of whether an accusation made during parliamentary proceedings by a member of Parliament (MP) can be used in defamation proceedings to provide a meaning to a later affirmation made outside of such proceedings.

This case, for obvious reasons, was of concern to parliamentarians from its very outset. It was referred to Parliament's privileges committee in 1998,<sup>5</sup> but that body's investigation of the issues involved was put on hold while the case remained before the courts. Now that the Privy Council has issued a definitive decision, the privileges committee has begun to consider what action (if any) it will recommend the House take in light of the judgement. Simply put, the privileges committee must decide if Parliament ought to replace the judiciary's interpretation of the extent of the free speech privilege with its own decision on the matter. This comment outlines the Privy Council's decision in *Jennings v Buchanan*, and unpicks the reasons for the Court's judgement. It then considers some potential problems with the judicial approach taken, problems which may give the privileges committee cause to recommend that the House move to legislate to overturn the decision. Finally, it makes some suggestions as to the form such legislation should take.

### ***The Privy Council's decision in Jennings v Buchanan***

The *Jennings v Buchanan* litigation had been refined to a single issue by the time it reached the Privy Council; viz, whether a plaintiff is entitled to refer to a statement made during a proceeding of Parliament in order to attribute a defamatory meaning to an extra-parliamentary statement made at a later date. Mr Jennings, an MP speaking in the House, accused Mr Buchanan, a member of the New Zealand Wool Board, of a

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<sup>5</sup> Privileges Committee, *Question of privilege referred on 21 July 1998 concerning Buchanan v Jennings*, CP No IC9/98.

gross abuse of his official position.<sup>6</sup> Subsequently, Mr Jennings told a newspaper that “he did not resile from his claim about the official’s relationship, just the money.”<sup>7</sup> Mr Buchanan then sued for defamation, claiming that Mr Jennings’ comment to the newspaper amounted to an affirmation of his earlier parliamentary allegation, which constituted a re-publication of the words outside of the House.<sup>8</sup> The case therefore required a judicial determination of the extent of the absolute privilege attaching to the speech of MP’s and other participants in Parliament’s proceedings, as encapsulated in article 9 of the Bill of Rights 1688; “... the freedom of speech and debates or proceedings ought not to be impeached or questioned in any Court or place out of Parliament.”<sup>9</sup>

The NZ Court of Appeal, by a 4-1 majority,<sup>10</sup> had found that Mr Jennings’ published comment constituted an affirmation of his earlier allegation in Parliament,<sup>11</sup> before further accepting that this parliamentary statement could be referred to as a matter of “historical fact” in order to give a defamatory meaning to the bare

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<sup>6</sup> Namely, that Mr Buchanan had procured Board sponsorship of a rugby tour to the United Kingdom so as to be able to continue an extra-marital affair with another member of the Board.

<sup>7</sup> Or words to that effect; see *Jennings v Buchanan* [2004] UKPC 36 at para 5. Mr Jennings also wrote a letter to the same newspaper demanding a general inquiry into Mr Buchanan’s activities.

<sup>8</sup> See *R v Abingdon* (1749) 170 ER 337; *R v Creevy* (1813) 105 ER 102.

<sup>9</sup> Art 9 is in force in New Zealand by virtue of the *Legislature Act 1908* (NZ), s 242, and the *Imperial Laws Application Act 1988* (NZ), s 3(1). Its effect is affirmed by the *Defamation Act 1992* (NZ), s 13(1) (“Proceedings in the House of Representatives are protected by absolute privilege.”)

<sup>10</sup> *Buchanan v Jennings* [2002] 3 NZLR 145 (CA).

<sup>11</sup> The majority also made use of the phrases “effective repetition” and “adoption by reference”.

affirmation.<sup>12</sup> This holding heavily relied upon the Privy Council's decision in *Prebble v Television New Zealand*,<sup>13</sup> where their Lordships had voiced "no objection" to a party alleging in court "the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning".<sup>14</sup> And because the majority held the later, extra-parliamentary affirmation was the basis for the defamation claim (with the earlier parliamentary statement merely completing any gap in the meaning of this affirmation), there was no impeachment or questioning of the parliamentary statement itself.<sup>15</sup> Furthermore, the majority did not believe that the underlying purpose of art. 9 was threatened by this approach: "The prospect of the present proceedings would not have inhibited the appellant *at the time he spoke in the House*. It was only his unprotected *later* statement that enabled the proceedings to be brought."<sup>16</sup>

The majority's decision was the subject of some academic criticism in New Zealand,<sup>17</sup> with these critics championing Tipping J's lone dissent; viz, the "only secure and principled approach is to limit the plaintiff, for the purpose of establishing the necessary ingredients of his cause of action, to words which have been spoken or

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<sup>12</sup> Or, as the majority put it; "any gap in the public statement was plainly to be completed by going to the published proceedings of Parliament or other available (and generally privileged) sources of the statement". *Buchanan v Jennings* [2002] 3 NZLR 145 at para 52 (CA).

<sup>13</sup> [1994] 3 NZLR 1 (PC).

<sup>14</sup> *Prebble v TVNZ* [1994] 3 NZLR 1 (PC) at 34. See also *Hyams v Peterson* [1991] 3 NZLR 648 at 656 (CA) (per Cooke P).

<sup>15</sup> This finding echoed that made in two Australian cases, *Beitzel v Crabb* [1992] 2 VR 121; *Laurence v Katter* (1996) 141 ALR 447. But see *Rann v Olsen* (2000) 76 SASR 450.

<sup>16</sup> *Buchanan v Jennings* [2002] 3 NZLR 145 (CA) para 53 (emphasis in the original).

<sup>17</sup> McGee, n 2; Allan J, "Parliamentary Privilege: Will The Empire Strike Back?" (2002) 20 *New Zealand Universities Law Review* 205; Joseph P, "Constitutional Law", [2003] *New Zealand Law Review* 387, pp 428-432.

written outside the House by the MP personally.”<sup>18</sup> The Speaker of the House appeared to share this view, as he invited the Attorney General to seek leave (subsequently granted) to intervene in support of Mr Jennings’ appeal to the Privy Council.

However, the Privy Council preferred the reasoning of the Court of Appeal majority, and unanimously rejected the appeal. Their Lordships noted that the case raised a tension between “the need to afford a measure of protection to the reputation and credit of individuals”,<sup>19</sup> and the “value of free and open communication” protected by the absolute privilege given to parliamentary statements,<sup>20</sup> as guaranteed by art. 9. The claim that art. 9 precluded the courts from taking *any* judicial notice of what is said in Parliament was then rejected. Such statements already are referred to as an aid in interpreting statutes,<sup>21</sup> and as evidence of the lawfulness or otherwise of ministerial actions.<sup>22</sup> Parliament itself, as demonstrated by the *Report of the Joint Committee on Parliamentary Privilege*,<sup>23</sup> appears to have acquiesced in this state of affairs. Therefore, their Lordships held, art. 9 is not breached so long as a parliamentary statement only is used to give meaning to a *subsequent* affirmation of

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<sup>18</sup> *Buchanan v Jennings* [2002] 3 NZLR 145 para 141 (CA).

<sup>19</sup> *Jennings v Buchanan* [2004] UKPC 36 para 6.

<sup>20</sup> *Jennings v Buchanan* [2004] UKPC 36 para 8.

<sup>21</sup> *Pepper v Hart* [1993] AC 593.

<sup>22</sup> *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696; *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p World Development Movement Ltd* [1995] 1 WLR 386; *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513.

<sup>23</sup> HL 43-I / HC 214-I, 9 April, 1999, paras 42 & 49. Although this report was by a Committee of the UK Parliament, the Privy Council felt it relevant as “there is no distinction to be drawn between the law of New Zealand and that of the United Kingdom so far as concerns the issue in this appeal.” *Jennings v Buchanan* [2004] UKPC 36 at para 16.

that statement,<sup>24</sup> because participants in parliamentary proceedings still enjoy absolute privilege when speaking in that forum.<sup>25</sup>

As noted at the beginning of this comment, the privileges committee of New Zealand's Parliament is now considering how to respond to the position taken by the Court of Appeal, and subsequently by the Privy Council. Before looking at why it might be concerned, however, it is necessary to consider the justifications for attaching an absolute privilege to speech made during parliamentary proceedings. An appreciation of these justifications in turn illuminates why the courts' chose to limit the extent of that absolute privilege in the fashion that they did.

***The basis for Parliament's "freedom of speech" privilege, and its limitations.***

While the legal basis for the free speech privilege enjoyed by participants in Parliament's proceedings lies in the three century old wording of art. 9, there are two bedrock public purpose justifications for retaining this privilege in the present day. The such first rationale lies in the role it plays in ensuring the separation of the branches of government. Speaking for the Privy Council in the *Prebble v TVNZ* case, Lord Browne-Wilkinson summarized this goal as follows:

In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz, that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the

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<sup>24</sup> *Jennings v Buchanan* [2004] UKPC 36 at para 19. Their Lordships thus expressly approved of the New Zealand High Court decision in *Peters v Cushing* [1999] NZAR 241, that a *later* parliamentary statement may not be used to ascribe a defamatory meaning to words spoken *previously* outside of parliamentary proceedings.

<sup>25</sup> Their lordships also rather cryptically suggested; "A statement made out of Parliament may enjoy qualified privilege but will not enjoy absolute privilege, even if reference is made to the earlier privileged statement." *Jennings v Buchanan* [2004] UKPC 36 at para 20. Quite what statements might be covered by such a qualified privilege was not indicated.

walls of Parliament in performance of its legislative functions and protection of its established privileges.<sup>26</sup>

Therefore, by carving out a zone within which Parliament may regulate and control its own activities, art. 9 recognises the sovereignty of Parliament as an institution, and limits the potential for the courts and the legislature to clash over how Parliament's business ought to be conducted.

The second rationale for the free speech privilege is that it avoids the “chilling effect” that potential legal sanction may have on the speech of those taking part in parliamentary proceedings. As Lord Browne-Wilkinson put it:

The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect.<sup>27</sup>

In brief, the general societal benefit of having a representative law-making institution where all participants may speak their minds without fear of incurring subsequent legal liability is deemed to outweigh any potential harm — whether to an individual or otherwise — caused by a given speech act.

The Privy Council in *Jennings v Buchanan* acknowledges the ongoing significance of these twin public policy concerns.<sup>28</sup> However, their Lordships were also concerned that the immunity from civil liability flowing from the free speech privilege ought not to enable an MP (or other participant in a parliamentary proceeding) to persist in publicly maligning an individual citizen's character. While the risk of a false accusation being levelled during the course of Parliament's business

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<sup>26</sup> *Prebble v TVNZ* [1994] 3 NZLR 1, at 6-7 (PC).

<sup>27</sup> *Prebble v TVNZ* [1994] 3 NZLR 1, at 8 (PC).

<sup>28</sup> *Jennings v Buchanan* [2004] UKPC 36, at paras 8, 10.

might be a necessary price for guaranteeing robust debate in that arena, an MP (or other participant) who continues to raise false accusations *outside* that forum — even if he or she only does so obliquely — should have to account at law for the harm done to the citizen concerned. Their Lordships thus reduced the scope of art. 9 to a policy that participants only need remain free to speak in an uninhibited fashion *while directly involved in the proceedings of Parliament*.<sup>29</sup> Having freely spoken in this forum, participants ought to exercise “a degree of circumspection” before affirming any potentially defamatory statement outside of Parliament,<sup>30</sup> for there is no benefit — but potentially considerable individual reputational harm — in drawing ongoing public attention to an untrue accusation made against an individual citizen.

I suggest, therefore, that the Privy Council’s decision regarding the extent of the free speech privilege relies upon a form of cost-benefit reasoning with regard to parliamentary speech. The bench saw their decision as posing little potential harm to the ability of participants to speak freely while directly involved in parliamentary proceedings — although it may make participants more careful subsequently when commenting on their parliamentary statements. Against this minor (even negligible) perceived harm, the right to sue for any subsequent affirmation potentially defamatory parliamentary statement carries the benefit of protecting private individuals from suffering the harm of an ongoing defamation of their character — or, at least, enabling them to claim compensation for that harm if they are in fact made subject to such treatment.

***Potential problems with the Jennings v Buchanan decision.***

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<sup>29</sup> See n 24 above.

<sup>30</sup> *Jennings v Buchanan* [2004] UKPC 36, at para 20.



There are two aspects to the Privy Council's decision that likely will be of concern to Parliament's privileges committee.<sup>31</sup> Firstly, the judgement is built upon something of a fib — that the defamation action “really” targets the later extra-parliamentary affirmation, not the earlier parliamentary statement. Legal fictions, of course, play an important role in our legal system, and so a claim that a judicial decision rests upon a falsehood is not of itself a fatal criticism. However, the effect of the present fiction is to disguise the fact that the court is involved in directly judging the veracity of a statement made during a parliamentary proceeding.<sup>32</sup> Taken alone, the subsequent affirmation of that parliamentary statement is meaningless. All it provides is a hook upon which a court can hang the prior parliamentary statement for scrutiny. Thus, the courts actually are stepping into a realm which previously has been closed to them: holding members of Parliament (and other parliamentary participants) directly to account for their words and behaviour whilst engaged in a parliamentary proceeding.

Furthermore, this step has been taken at a time where there is a markedly increased sensitivity on the part of parliamentarians towards judicial intervention onto “their” turf. This sensitivity has arisen for a variety of reasons: the political consequences of Court of Appeal's decision that Maori may be able to claim aboriginal title to parts of New Zealand's foreshore and seabed;<sup>33</sup> the uncertainties caused by the creation of a new Supreme Court to replace the Privy Council at the

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<sup>31</sup> These criticisms echo those earlier made of the Court of Appeal's majority judgment. See n 17 above.

<sup>32</sup> Professor Philip Joseph suggested to me that this point becomes clear if we imagine that Mr Jennings had relied upon the defence of truth to Mr Buchanan's action; *Defamation Act 1992* (NZ), s 8. A court could only decide whether this defence applied by investigating whether Mr Buchanan had in fact acted as Mr Jennings alleged in his parliamentary statement; i.e., had Mr Jennings (wittingly or not) lied to Parliament?

<sup>33</sup> *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

apex of New Zealand's judicial hierarchy;<sup>34</sup> a dispute between New Zealand's Chief Justice and Deputy Prime Minister over the meaning of "Parliamentary Sovereignty".<sup>35</sup> Consequently, Parliament's privileges committee — along with the House in general — will be especially attuned to any breaches of the traditional comity shown between the branches of government. Simply put, Parliament is not presently in the mood to accept that the judiciary should be given some oversight role over the effect of words spoken during its proceedings.

Secondly, it may be argued persuasively that the fear of a defamation action based on some later affirmation of parliamentary speech poses a greater potential threat to such speech than the Privy Council's assessment. For one thing, it is not clear exactly what sort of words or conduct will constitute such an "affirmation". There is no apparent "bright line" test here.<sup>36</sup> Therefore, a parliamentary participant cannot know with any certainty what he or she safely may say publicly in regard to any statement he or she has made in Parliament. Flowing from this point is that in our media society, parliamentary participants (and MPs in particular) will come under intense pressure to comment on, and defend, their parliamentary statements. It is debatable whether complete silence on the matter is a realistic option in this climate. Equally, it is also questionable whether such complete silence is a *desirable* option. It

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<sup>34</sup> *Supreme Court Act 2003* (NZ).

<sup>35</sup> Compare Elias S, "Sovereignty in the 21st Century: Another spin on the merry-go-round" (2003) 14 PLR 148; with Cullen M, "Parliamentary sovereignty and the Courts" [2004] NZLJ 243.

<sup>36</sup> The difficulty of line-drawing in this area is highlighted by the majority judgment in the Court of Appeal; "silence outside the House maintains the protection, as does any statement made outside the House which merely acknowledges or does not affirm or effectively repeat the defamatory statement. Whether a later statement does affirm or effectively repeat the privileged statement is a matter of fact to be determined in the circumstances of the case." *Buchanan v Jennings* [2002] 3 NZLR 145 at para 62 (CA).

would reduce the ability of the media (and hence the public) to hold accountable an MP for their statements, in that a member may well use the threat of potential lawsuits to duck all questions relating to the words he or she has spoken in Parliament.

Therefore, the uncertainty as to just what sorts of subsequent extra-parliamentary statements might open up an MP or other parliamentary participant to legal liability might have the kind of chilling effect that art. 9 is supposed to avoid. It may make the media — which would also be potentially liable for publishing any affirmation of a defamatory parliamentary statement — less likely to ask questions regarding such statements; or parliamentary participants less likely to answer any such questions. Indeed, parliamentary participants may decide that rather than run the risk of accidentally later affirming some potentially defamatory parliamentary statement, they simply will not speak up in the first place. Or, alternatively, they will “hedge and trim” their parliamentary language so as to be sure of avoiding any future liability.

***Should the holding in Jennings v Buchanan be overridden by Parliament?***

The twin concerns just outlined have real merit, and I do not believe either the majority of the Court of Appeal, or the Privy Council, gave them sufficient weight. Therefore, the privileges committee would be justified in recommending, and the House in enacting, legislation to undo the effect of *Jennings v Buchanan*. The simplest and least intrusive way of achieving this object would be to introduce a new s 13A into the *Defamation Act 1992*, so as to make it clear that a participant in a defamation action may not draw on words used during a proceeding of Parliament in order to

provide any additional meaning to an extra-parliamentary publication.<sup>37</sup> There is, of course, no legal obstacle to such legislative action in New Zealand, as the powers of the House of Representatives are not trammelled by any constitutional document.<sup>38</sup>

However, a possible principled objection to such legislation is that it would be an undesirable form of political self-dealing. While the free speech privilege extends to all participants in parliamentary proceedings, the primary beneficiaries of the immunity it grants are the very MPs who would decide the proper extent of the privilege's ambit. Equally, it is not MPs — who are obliged to develop a tolerance for the slings and arrows of parliamentary accusations — who will most desire legal redress, but rather private citizens. Hence, were MPs to legislate to undo the effect of *Jennings v Buchanan*, they could be accused of protecting their ability to slander private citizens without consequence, at the cost of the common law reputational rights of those citizens.

There are two responses to such an objection. The first is to ask what is the alternative to legislative action. If the courts have got this present issue wrong, as I believe they have, then the options are to either live with the undesirable consequences of that error, or act to fix it. And fixing the error will require either that the country's new Supreme Court overrule the Privy Council's decision (an uncertain outcome at best, and one that would require enormous litigation expenses for some unknown set of parties), or legislative action by the House. Therefore, in spite of the risk that MPs might be regarded as protecting their own, the legislative road represents the least-worst option of all available.

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<sup>37</sup> This would undo the immediate effect of the decision in *Jennings v Buchanan* [2004] UKPC 36, while still allowing judicial notice to be taken that a proceeding in Parliament has occurred as "proof of historical facts"; *Prebble v TVNZ* [1994] 3 NZLR 1 at 11 (PC).

<sup>38</sup> Indeed, privilege has its basis in ordinary statute; see n 9 above.

Finally, any concern that private citizens will be exposed to the risk of an ongoing attack on their character by an MP able to hide behind the free speech privilege might better be addressed through Parliament's own internal procedures. Standing Orders already allow any person (other than an MP) referred to in the House to apply to the Speaker to have a response to that reference included in the parliamentary record.<sup>39</sup> Similarly, Standing Orders prescribe a series of safeguards where allegations that may seriously damage a person's reputation are placed before a select committee of the House.<sup>40</sup> One possible addition to these measures would be a legislative amendment to allow the House to waive its free speech privilege where it deems the privilege has been abused by a member.<sup>41</sup> Admittedly, this suggestion contains a number of problems,<sup>42</sup> not the least of which is the danger of such a power being applied in a partisan fashion. Nevertheless, if the House is to take back a broader institutional privilege of unimpeded free speech for its participants, there is a strong argument for it to take institutional responsibility for ensuring this privilege is not abused.

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<sup>39</sup> New Zealand Parliament, *Standing Orders of the House of Representatives* (2004), SO 160-163.

<sup>40</sup> New Zealand Parliament, *Standing Orders of the House of Representatives* (2004), SO 234-238.

<sup>41</sup> The New Zealand House of Representatives has decided that it does not have this power currently; see New Zealand Parliament, *Interim Report of the Privileges Committee 1991-93*, AJHR, I, 15B; (1993) NZPD vol 536 at 16191-16195.

<sup>42</sup> See E. Campbell, *Parliamentary Privilege* (2003) at 137-143.